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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 20

EARL P. HOINESS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 17, 1948.

CERTIORARI GRANTED MARCH 29, 1948.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

In Admiralty

No. 24322

EARL P. HOINESS, Libelant,

vs.

UNITED STATES OF AMERICA, WAR SHIPPING ADMINISTRATION OF THE UNITED STATES OF AMERICA, American South African Line, Inc., a corporation, The Doe Company, Richard Roe and John Doe, Respondents.

SEAMAN'S LIBEL IN PERSONAM—Filed July 16, 1945

(For benefits under Second Seamen's War Risk Policy, and for Damages, Wages, Maintenance and Cure under the Act of April 11, 1942, 46 USCA 1128-1128 (F) and under the Suits in Admiralty Act, The Jones Act and Public Law 17, 78th Congress)

[fol. 2] (Under 28 USCA 837 without prepayment of costs or fees and without security therefor)

To the Honorable the Judges of the Above Entitled Court:

The libel of Earl P. Hoiness, late seaman on the United States vessel SS Escanaba Victory, owned by the United States of America and the War Shipping Administration of the United States of America, and managed, navigated, maintained and operated by the American South African Line, Inc., a corporation, as general agents for the said United States of America and War Shipping Administration of the United States of America, against said owners and agents, and against all persons lawfully intervening for their interests, in a cause of action for benefits under the Second Seamen's War Risk Policy, and for damages, wages, maintenance and cure, civil and maritime, alleges:

I

That the United States vessel SS Escanaba Victory is a vessel of United States registry and now is, and during

all the times herein mentioned, was owned by the United States of America and the War Shipping Administration of the United States of America and was managed, maintained, operated and navigated by the American South African Line, Inc. as general agents for said United States of America and the War Shipping Administration for the United States of America.

II

That the respondent American South African Line, Inc. [fol. 3] has a main office and principal place of business in the City and County of San Francisco, State of California, and is within the jurisdiction of the above entitled Court.

III

That the respondents United States of America and the War Shipping Administration of the United States of America maintain offices and principal places of business in connection with the matters of which complaint is made in the within libel in the City and County of San Francisco, State of California, and said respondents are within the jurisdiction of the above entitled Court.

IV

That the respondents The Doe Company, Richard Roe and John Doe are fictitious names and libelant does not know the true names thereof and prays leave to insert said true names when ascertained.

V

That libelant is a merchant seaman and elects to take advantage of the provisions of 28 USCA 837 and to proceed herein without payment of costs or fees and without security therefor.

VI

That libelant brings and maintains this action pursuant to the provisions of the Act of April 11, 1942, Chap. 240; 56 Stat. 215; 46 USCA 1128-1128(F) Incl.; and also pursuant to the provisions of the Act of March 9, 1920, Chap. 95; 41 Stat. 525, 526 as amended, 46 USCA 741-752, com- [fol. 4] monly known as the "Suits in Admiralty Act"; and under the Act of June 5, 1920, Chap. 250, 41 Stat. 1007,

commonly known as the Jones Act, and also pursuant to Public Law 17, 78th Congress, Act of March 24, 1943.

VII

Libelant brings and maintains this action as against all the respondents other than the American South African Line, Inc., pursuant to the provisions of the Second Seamen's War Risk Policy, which policy of insurance was in full force and effect during all the times herein mentioned, and particularly in full force and effect for the voyage aboard the SS Escanaba Victory, during which voyage various occurrences took place which gave rise to the instant action as more fully particularly set forth hereinafter. That said Second Seamen's War Risk Policy was made, issued, signed and given effect by the respondents herein for and on behalf of libelant and seamen in like circumstances in connection with the voyage hereinafter more fully described. That a copy of said Second Seamen's War Risk Policy, which is set out in full in the Federal Register for March 20, 1943, P. 3456, is incorporated herein by this reference with the same force and effect as though fully set forth hereinafter.

VIII

That libelant was in the employ of respondents, and each of them, aboard said vessel for the period from August 10, 1944, when he joined the vessel at the port of Aberdeen, Washington, to and including January 15, 1945, when he was separated from said vessel at the port of San Francisco, California.

[fol. 5] IX

That on January 16, 1945, at or about the hour of 1:00 A.M. and while said vessel was docked at the port of San Francisco, California, libelant was on the main deck of said vessel, in the service of said vessel and in the employ of respondents and each of them, and that at said time and place there was attached to the service of and on said vessel a member of the United States Navy whose name was "Red" Howland, seaman 1/Cl. who was a member of the gun crew of said vessel.

That at said time and place the said Howland without provocation fired a bullet from a pistol at libelant causing him severe physical personal injuries, namely, internal

injuries to the abdomen, right chest; fracture of the tenth rib; and traumatic pleuritis, as result of which libelant was disabled and required hospitalization from January 16, 1945, to and including June 16, 1945 (so affiant is informed and believes and alleges), a period of five months. That as result of said disability libelant is entitled to and claims benefits under said Second Seamen's Risk Policy in the amount of $650.00.

X

That heretofore, to wit, on February 26, 1945, libelant by his counsel, filed written claim in and about the matter of which complaint is hereby made with the Chief Adjuster of the Division of Wartime Insurance of the War Shipping Administration of the United States of America, as required by the provisions as provided by the rules and [fol. 6] regulations adopted by said agency pursuant to the Act of March 24, 1943, and thereafter, to wit, on June 21, 1945 said claim was disallowed and denied by said agency.

XI

That all and singular the allegations hereof are true and are within the admiralty jurisdiction of the above entitled Court.

Wherefore, libelant prays judgment, etc.

As And For A Second, Separate And Additional Cause Of Action, libelant complains of all the respondents herein, and alleges:

I

Incorporates herein by this reference as though set out in full the allegations contained in paragraphs I, II, III, IV, V, VI, VII, VIII, X and XI of said first cause of action herein.

II

That on or about January 16, 1945 at or about the hour of 1:00 P.M. said vessel was docked at the port of San Francisco, California; and libelant was in the service of said vessel and in the employ of respondents and each of them.

That at said time and place there was in the service of said vessel a person by the name of "Red" Howland Seaman 1/Cl, a member of the United States Navy, and of the gun crew of said vessel. That the said Howland was a

violent, pugilistic and unruly individual given to the use of force and physical violence against the civilian members of the crew of said vessel, including libelant, which facts were well known to respondents and each of them; and [fol. 7] particularly the master of said vessel. That respondents and each of them and the master of said vessel, who was an employee and agent of the United States of America in and about matters of which complaint is herein made, failed to control, supervise and discipline said Howland, which conduct on the part of respondents and each of them rendered said vessel unseaworthy and constituted negligence on the part of respondents and each of them.

That at the time and place mentioned said Howland fired a bullet from a pistol at libelant causing libelant grievous and severe physical injuries as more particularly described hereinafter, which injuries were the direct and proximate result of the failure of respondents and each of them to maintain said vessel in a seaworthy condition, and which resulted from the negligence of respondents and each of them as hereinabove alleged.

III

That as result of the acts of which complaint is herein made libelant suffered the following personal injuries: a bullet wound of the abdomen and bullet wound of the right chest, fracture of the tenth rib, and traumatic pleuritis. That said injuries caused libelant grievous and severe physical and mental pain and suffering, and required hospitalization at the San Francisco Hospital and the United States Marine Hospital; and that libelant was operated upon as result of said injuries.

Libelant is informed and believes and alleges that he will suffer permanent disability, namely, a weakness of the stomach and right chest as result of said injuries. That as [fol. 8] result of said injuries libelant has suffered general damage in the sum of $35,000.00.

IV

That heretofore, to wit, on February 26, 1945, libelant made claim upon respondents and each of them in and about the matters of which complaint is herein made, and as provided by the regulations of the Act of March 24, 1943, but

said claim has been administratively disallowed by said respondents.

Wherefore, libelant prays judgment, etc.

As and for a third, separate and additional cause of action, libelant complains of all the respondents herein, and alleges:

I

Incorporates herein by this reference as though set out in full the allegations contained in paragraphs I, II, III, IV, V, VI, VII, VIII, X and XI of the first cause of action herein, and paragraphs I and IV of the second cause of action herein.

II

That on January 16, 1945 while said vessel was docked at the port of San Francisco, California, respondents suffered personal injuries in the service of said vessel when he was shot by a pistol bullet by one "Red" Howland, said injuries consisting of the following: a bullet wound of the abdomen and bullet wound of the right chest, fracture of the tenth rib, and traumatic pleuritis.

III

[fol. 9] That libelant required hospitalization on account of said injuries. That libelant was discharged from the United States Marine Hospital at San Francisco on or about March 20, 1945. That thereafter libelant was unable to work on account of said injuries, so affiant is informed and believes and alleges, until June 16, 1945, a period of eighty-eight (88) days.

Libelant is entitled to maintenance money in the reasonable sum of $5.00 daily during said period of time, or maintenance money in the sum of $440.00, which sum is presently due, owing and unpaid for respondents to libelant.

Wherefore, libelant prays judgment, etc.

As and for a fourth, separate and additional cause of action, libelant complains of all the respondents herein, and alleges:

I

Incorporates herein by this reference as though set out in full the allegations contained in paragraphs I, II, III, IV, V, VI, VII, VIII, X and XI of the first cause of action here-

in, and paragraphs I and IV of the second cause of action herein, and paragraphs II of third cause of action herein.

II

Libelant is entitled to and claims wages at the rate of $87.50 per month from January 16, 1945 to and including June 16, 1945, a period of five months, or wages in the sum of $437.50, which sum is presently due, owing and unpaid from respondents and each of them to libelant.

[fol. 10] Wherefore, libelant prays that process in due form of law according to the course of this Honorable Court and in causes of admiralty and maritime jurisdiction may issue against said respondents and each of them and that citation in personam may issue against said respondents and each of them and that they be cited and required to appear and answer upon oath all and singular the matters aforesaid, and that this Honorable Court may be pleased to decree the payment by respondents and each of them of the sum of $35,877.50, and as against the United States of America and War Shipping Administration of the United States of America the sum of $650.00, together with costs of suit herein, and that libelant may have such other and further relief as is meet and just in the premises.

Dated: July 3, 1945.

Andersen & Resner, by Herbert Resner

Verification

[File endorsement omitted.]

[fol. 11] In United States District Court

Answer of the Respondent United States of America—Filed September 10, 1945

Comes now respondent, United States of America, and answering the libel herein alleges as follows:

As to the First Cause of Action.

I

Answering the allegations of Article 1, respondent alleges that it is the owner and operator of the SS Escanaba Victory and that the American South African Line, Inc., is the

general agent for this respondent in respect to the said vessel.

II

Denies each and every, all and singular, the allegations of Article II.

III

Admits the allegations of Article III.

IV

Respondent has no information or belief upon this subject as to the allegations contained in Article IV, and placing its denial upon said ground denies the same.

V

Admits the allegations in Article V.

VI

Answering the allegations of Article VI, respondent leaves all questions of jurisdiction to the Court.

VII

Respondent admits that the Second Seamen's War Risk Policy was in full force and effect in respect to the libelant [fol. 12] while aboard the SS Escanaba Victory from August 10, 1944, to January 15, 1945, and with this exception denies that libelant has any right under the Second Seamen's War Risk Policy, or otherwise, or at all, and on that ground denies the remainder of the allegations contained in Article VII.

VIII

Answering the allegations of Article VIII, this respondent alleges that libelant entered into shipping articles with the United States of America, thru the War Shipping Administration, on or about August 10, 1944, and alleges that said libelant was separated from his employment on January 15, 1945.

IX

Answering the allegations of Article IX, respondent alleges that on January 16, 1945, the SS Escanaba Victory was docked at San Francisco, California, and that at said

time there was attached to the service of the vessel as a member of the United States Navy and a member of the Armed Guard, a seaman first class by the name of Red Howland. Further answering the allegations of Article IX respondent denies that libelant was in the employ of said respondent during any of the said times mentioned in Article IX. With these exceptions, respondent has no information or belief on the subject sufficient to enable it to answer the allegations in Article IX, and placing its denial upon said ground denies the same.

X

Denies each and every, all and singular, the allegations of Article X.

[fol. 13]

XI

Denies each and every, all and singular, the allegations of Article XI.

As to the Second Cause of Action:

I

Answering the allegations of Article I thereof, respondent refers to all of the admissions, denials and allegations contained in its answer to the first cause of action herein incorporates the same herein by reference thereto as if the same were set forth herein in full.

II

Answering the allegations of Article II, respondent alleges that on January 16, 1945, said vessel SS Escanaba Victory was docked at San Francisco, California; and further answering the allegations of Article II alleges that at the said time and place on said vessel there was a member of the United States Navy, a member of the Armed Guard, aboard said vessel by the name of Red Howland, Seaman first class, and with these exceptions denies the allegations contained in Article II.

III

Answering the allegations of Article III, respondent denies that any of the injuries or damages alleged therein are a, or any, result of his said employment aboard the SS Escanaba Victory. Specifically denies that libelant has

been damaged in the sum of $35,000, or in any other sum or sums, or otherwise, or at all. With these exceptions, respondent has no information upon the subject which would enable him to answer the allegations of Article III thereof, [fol. 14] and placing its denial upon said ground, denies the same.

IV

Denies each and every, all and singular, the allegations of Article IV.

Further answering libelant's 2nd cause of action and as a separate, special and complete defense thereto, respondent alleges on information and belief: that any injuries sustained by libelant on board the SS Escanaba Victory at or about the time alleged in the libel were cause solely and proximately by the wrongful acts of one Red Howland, Seaman 1/c United States Navy, and a member of the gun crew or armed guard placed aboard the said vessel by the United States Navy and a person whom the Master and officers of said vessel had no control, supervision or authority, and were not caused or contributed to in any manner by any negligence of respondents, their servants, agents, representatives or persons for whom they are responsible or by reason of any defect, insufficiency or unseaworthiness of said vessel. That by reason of the premisses if said vessel were privately owned or operated no proceeding in admiralty could be maintained against the respondents as required by Section 2 of the "Suits in Admiralty Act", 1920 (46 USC 742) and accordingly the United States has not consented to be sued therefore, and this court has no jurisdiction of respondent United States of America.

As to the Third Cause of Action:

I

Answering the allegations of Article I thereof, respondent refers to all of the admissions, denials and allegations con- [fol. 15] tained in its answer to the first cause of action herein and incorporates the same herein by reference thereto as if the same were set forth herein in full.

II

Answering the allegations of Article II, this respondent alleges that the SS Escanaba Victory was docked at San

Francisco, California on January 16, 1945, and with these exceptions denies the allegations of Article II thereof.

III

Answering the allegations of Article III thereof, respondent has no information or belief in respect to the period of libelant's hospitalization or time of discharge, and placing its denial upon said ground, denies the same. Specifically denies that libelant is entitled to maintenance money in the sum of $440.00, or any other sum or sums, or otherwise, or at all.

Further answering to the 3rd cause of action and as a special, separate and complete defense thereto, respondent alleges on information and belief: that any injuries sustained by libelant on board the SS Escanaba Victory at or about the time alleged in the libel, did not result from the negligence of any of the officers, agents or employees of said vessel, or by reason of any defect or insufficiency or unseaworthiness therein, but the same were caused solely and proximately by the gross negligence or wilful misconduct of the libelant or the result of his own vices.

As to the Fourth Cause of Action:

I

Answering the allegations of Article I thereof, respondent [fol. 16] refers to all of the admissions, denials and allegations contained in its answer to the first cause of action herein and incorporates the same herein by reference thereto as if the same were set forth herein in full.

II

Denies each and every, all and singular, the allegations of Article II. Specifically denies that libelant is entitled to the sum of $437.50, or any other sum or sums, or otherwise, or at all.

Further answering the 4th cause of action and as a special, separate and complete defense thereto, respondent alleges on information and belief: that any injuries sustained by libelant on board the SS Escanaba Victory at or about the time alleged in the libel, did not result from the negligence of any of the officers, agents or employees of said vessel,

or by reason of any defect or insufficiency or unseaworthiness therein, but the same were cause solely and proximately by the gross negligence or wilful misconduct of the libelant or the result of his own vices.

Wherefore, respondent prays that said libel be dismissed herein.

Frank J. Hennessy, United States Attorney, by W. E. Licking, Assistant U. S. Attorney, John H. Black, Ed. R. Kay, of Counsel for the United States of America.

[File endorsement omitted.]

[fol. 16a] IN UNITED STATES DISTRICT COURT

[Title omitted]

Reporter's Transcript—Thursday, April 4, 1946

COUNSEL APPEARING

For Libelant: Gladstein, Anderson, Resner, Sawyer & Edises, represented by Herbert Resner, Esq.

For Respondents: J. Hampton Hoge, Esq., and Henry W. Schaldach, Esq.

[fol. 16b] TESTIMONY OF EARL P. HOINESS

EARL P. HOINES: called on behalf of the libelant; sworn:

The Clerk:

Q. Will you state your name to the Court?

A. Earl P. Hoiness.

Direct Examination

Mr. Resner:

Q. Mr. Hoiness, what is your full name?

A. Earl Pershing Hoiness.

Q. Would you speak up loudly and distinctly so Counsel at the table can hear you and the Court can hear you.

Where do you live?

A. Portland, Oregon.

Q. What is your address there?

A. —

Q. Where were you born?
A. Braddock, North Dakota.
Q. How old are you?
A. Twenty-seven.
Q. Are you married?
A. No.
Q. Have you been?
A. Yes.
Q. Are you divorced from your wife?
A. Yes.
Q. Have you any children?
A. Yes.
Q. How old are they?
A. A boy, six and girl four.
Q. Do you support your children?
A. Yes.

Mr. Hoge: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Resner: I am showing his family surroundings, your [fol. 16c] Honor.

The Court: Objection overruled.

Mr. Resner:

Q. Mr. Hoiness, have you been in the past a merchant seaman by occupation?
A. Yes.
Q. When did you first go to sea?
A. September the 23rd, 1943.
Q. How old were you then?
A. Twenty-five.
Q. Prior to being a merchant seaman, what kind of work did you do?
A. Driving truck and worked in sawmills.
Q. In Oregon?
A. Yes.
Q. Has your home been in Oregon during recent years?
A. Yes, sir.
Q. Where did you get your training to be a seaman?
A. Catalina Island.
Q. The United States Maritime Service?
A. Yes.

Q. How long did you serve there?

A. Two and half months.

Q. Prior to the Escanaba Victory, on what vessel did you sail?

A. Seaman A. Knapp and the Cape Charles and Escanaba Victory.

Q. Did all those vessels make journeys into Pacific waters during the war?

A. Yes.

Q. Your service was in the Pacific, is that correct?

A. Yes.

Q. What capacity?

A. Messman.

Q. When you first joined the vessel involved in this case, the Escanaba Victory, where was it?

A. In Portland, around June.

[fol. 16d] Q. June of 1944?

A. Yes.

Q. Did you make a short trip, first, to the Hawaiian Islands and return?

A. Yes.

Q. Did you stay with the vessel on the second journey?

A. Yes.

Q. When did you join the vessel the second time?

A. Aberdeen, Washington.

Q. When you went aboard for the first time, that is, with regard to the second journey, was it August 10?

A. I believe it was, yes.

Q. August 10, 1944?

A. Yes.

Q. At Aberdeen, Washington?

A. Yes.

Q. Subsequently you signed foreign shipping articles, is that correct?

A. Yes.

Q. Were those articles signed on August 17?

A. Yes.

Q. 1944 at Aberdeen, Washington?

A. Yes, sir.

Mr. Ressner: Counsel, I assume you are familiar with the articles?

Mr. Hoge: Yes.

Mr. Ressner: I have here a photostatic copy.

Q. I want to show the shipping articles of the voyage in question and ask you to look at them, the voyage which is dated at Aberdeen, Washington, August 10, 1944, and I direct your attention to a page and ask you if your name appears on one of these pages?

A. Yes.

Q. Earl P. Hoiness?

A. Yes.

[fol. 16e] Q. And looking across the line it indicates you got aboard on August 10 and signed articles on August 17?

A. Yes.

Q. And then I direct your attention to another page. That was the sign-on page I showed you?

A. Yes.

Q. I show you the sign-off page, and did you sign your name fifth from the bottom on Line 76?

A. Yes.

Q. And the sign-off date is blank, is that correct?

A. That is correct.

Q. Where did you sign off the articles?

A. In the hospital.

Mr. Resner: I should like to offer in evidence this photostatic copy of the shipping articles, your Honor.

The photostatic copy of shipping articles were thereupon received in evidence and marked Libelant's Exhibit No. 5.)

Mr. Resner:

Q. Approximately when did you sign off the articles?

A. It was around three weeks or so after I was in the hospital.

Q. That would bring it around the early part of February, 1945?

A. Yes, it would.

Q. When that vessel left Aberdeen in August of 1944, where did she go?

A. To Finschhafen.

Q. Finschhafen, New Guinea?

A. Yes.

Q. How long did you lay there?

A. Just over night.

Q. Where did you proceed from there?

A. From there we proceeded to Manis.

Q. That is in the Admiralty Islands?
A. In the Admiralty Islands, Yes.

• • • • • • •

[fol. 16f] Q. Did you ever go into the Navy mess hall or forecastle?
A. Once or twice, but after that I didn't go back any more than I needed to.
Q. None of the merchant crew did, either?
A. No, sir.
Q. Did Howland keep coming back to the merchant crew's mess hall?
A. Yes.
Q. Did he carry on this argument about the wages during the whole voyage?
A. Yes, sir.
Q. Did he argue with the entire merchant marine about this matter?
A. Most all of them, yes.
Q. When did the vessel leave the Philippines?
A. Christmas Day.
Q. Did you come to San Francisco?
A. Yes.
Q. Did you stop enroute?
A. Yes, we stopped at Hollandia to fix the boilers.
Q. Then w-ere did you go?
A. To San Francisco.
Q. Do you know when you arrived?
A. It was on the 14th or 15th.
Q. Of what?
A. January.
Q. 1945?
A. Yes.
Q. Did you go ashore your first night you were here?
A. No.
Q. Did you go ashore the second day?
A. Yes.
Q. Did you stay ashore?
A. I stayed ashore.
Q. Did you come back the following day to the ship?
A. Yes.
[fol. 16g] Q. When was the payoff supposed to be?
A. The 16th.

Q. What time did you get back aboard the ship on the 16th?

A. Approximately 2:30.

Q. Two-thirty?

A. Yes.

Q. When you got on the ship where did you go?

A. I went to the boatswain's forecastle.

Q. Who was there?

A. The boatswain and two or three others of the merchant crew, and Red Howland was standing there.

Q. What were the names of the merchant crew there?

A. There was Henry Williams, Perrault, Bliss and Davis.

Q. What were you men doing?

A. Sitting in there talking.

Q. Did you have some drinks in there at that time?

A. Yes, they had a bottle and had about one drink—a round.

Q. And you were sitting there for the payoff?

A. Yes.

Q. Did Howland appear at that time?

A. Yes.

Q. What did he say?

A. He started bring up the argument and called me a Communist..

Q. What did he say?

A. I said I didn't think I was and I said, "I wish you would leave us alone and go on".

Q. What happened?

A. He just pulled out his gun and held it on me.

Q. On you or all of you?

A. All of us.

Q. Was he on watch at the time?

A. He was on gangway watch.

• • • • • • •

[fol. 17] IN UNITED STATES DISTRICT COURT

OPINION—Filed August 5, 1946

ST. SURE, District Judge:

This is a libel in personam primarily against the United States. The War Shipping Administration and American

South African Line were treated as nominal parties only. In brief, libelant seeks to recover insurance benefits, damages, wages and maintenance. Each of these claims is stated in a separate cause of action.

In paraphrase the libelant alleges that he is a merchant seaman; that the SS Escanaba Victory was a vessel owned by the United States and the War Shipping Administration; that it was of United States registry and at all pertinent times was operated, managed, navigated and controlled the American South African Line, Inc., as general agent; that the operating agent has a main office and principal place of business in San Francisco within the jurisdiction of this court; that the United States and the War Shipping Administration maintain offices and principal places of business in San Francisco and within the jurisdiction of the court; that this action is brought and maintained under the Second Seaman's War Risk Insurance Act, the Suits in Admiralty Act, the Jones Act and Public Law 17, 78th Congress, Act of March 24, 1943; "that libelant was in the employ of the respondents and each of them aboard the said vessel for the period from August 10, 1944, when he joined the vessel at the port of Aberdeen, Washington, to and including January 15, 1945, when he separated from [fol. 18] said vessel at the port of San Francisco . . . that on January 16, 1945 . . . while said vessel was docked at the port of San Francisco . . . (and while) libelant was on the main deck in the service of the said vessel and in the employ of respondents and each of them," he was shot and seriously wounded by a member of the United States Navy who was also a member of the vessel's gun crew; that the vessel was covered by a war risk policy under which he was entitled to benefits; that his claim therefor had been filed with the proper authority and had been disallowed. Ultimate facts pleaded in the first cause of action were incorporated by reference in the other three. To the foregoing were added allegations that with full knowledge of the "violent" and "unruly" propensities of the individual who shot libelant, respondents failed to control or supervise or discipline that individual, which conduct constituted negligence by which the vessel was rendered unseaworthy; that the injuries suffered were the direct and proximate result of the negligence of respondents. Prayer was for $35,000 damages. The remaining causes added that

libelant was entitled to maintenance and wages, respectively.

There were no exceptions to the libel, nor was there a motion to dismiss.

The answer of the United States and of American South African Line, Inc., denied libelant's right to benefits; denied his employment; denied negligence and affirmatively alleged that the injuries were solely and proximately caused by a member of the Navy over whom libelants had no control and by the wilful misconduct of libelant, or were the [fol. 19] result of his own vices. Each answer contained the following ". . . respondent leaves all questions of jurisdiction to the Court."

The case was heard on the merits and submitted.

Examination of the libel reveals that allegations of facts essential to the Court's jurisdiction have been omitted. The Second Seaman's War Risk Insurance Act (Act April 11, 1942, c. 240, 56 Stat. 215, 46 USCA § § 1128-1128h) so far as pertinent (1128d) provides:

> "In the event of disagreement as to claim for losses or amount thereof, on account of insurance under sections 1128-1128h . . . an action on the claim may be brought and maintained against the United States in the district court of the United States sitting in admiralty in the district in which claimant or his agent may reside, or in case the claimant has no residence in the United States, in a district court in which the Attorney General of the United States shall agree to accept service."

Further that "Said suits shall proceed and shall be determined according to the provisions of the (Suits in Admiralty Act) in so far as such provisions are not inapplicable and are not contrary to or inconsistent with the provisions of sections 1128-1128h."

There is no intimation in the libel that libelant is a resident within the jurisdiction of this court, or that he has no residence in the United States.

The first section of the Suits in Admiralty Act (Act Mar. 9, 1920, c. 95, 41 Stat. 525, as amended, 46 USCA § 741) provides:

"No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States . . . or operated by or for the United States or such corporation . . . shall in view of the provision herein for a libel in personam, [fol. 20] be subject to arrest or seizure by judicial process . . ."

Section 2 (46 USCA § 742) provides:

"In cases where if such vessel were privately owned or operated . . : a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States . . . Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them reside or have their principal place of business . . . or in which the vessel . . . charged with liability is found."

This libel does not allege that libelant has his principal place of business within the court's jurdisdiction, or that the vessel, at the commencement of the action, was found within this district. It is obvious, therefore, that the libel is fatally defective.

Notwithstanding the libel failed to allege that the injury was suffered on a vessel lying in navigable waters, it is obvious that the cause of action is based on a maritime tort. The Suits in Admiralty Act provides the exclusive remedy in admiralty against the United States and the War Shipping Administration for such a tort. (Eastern Transportation Co. v. United States, 272 U.S. 675; Emergency Fleet Corp. vs. Rosenberg Bros. & Co., 276 U.S. 202; Brady v. Roosevelt S.S. Co., 317 U.S. 575). Public Law 17, 78th Congress Act March 24, 1943 (57 Stat. 45, 50 USCA § 1297) avails libelant nothing, for it also provides that claims administratively disallowed may be enforced pursuant to the Suits in Admiralty Act.

[fol. 21] It follows that the libel must be dismissed for lack of jurisdiction as to the United States and the War Shipping Administration. (Blamberg Bros. v. United States, 260 U.S. 452; Carroll v. United States, 2d Cir., 133 F. 2d

690; Lopez v. United States, 59 F. Supp. 831; Abbott v. United States (D.C. N.Y.) 60 F. Supp. 700).

Elimination of the government and the War Shipping Administration leaves the question of jurisdiction with respect to the American South African Line, Inc.,

If libelant relied on the Jones Act (Act June 5, 1920, c. 250, § 33, 41 Stat. 988, 46 USCA § 688) so far as the operating agent is concerned, the libel fails to allege that the injury was suffered "in course of" libelant's employment, or any fact from which an inference that he was so injured could be drawn. On the contrary, his allegations are that he was employed to and including January 15, and that his injury occurred on January 16, 1945. In the absence of an allegation that libelant was re-employed after he separated from the vessel on January 15, or that separation from the vessel did not terminate his employment, the conclusion is warranted that at the time he was injured he was either a trespasser, a passenger or a guest. As such, and disregarding the fact that he sued as a seaman, the libel still fails to allege facts essential to the court's jurisdiction, in admiralty or otherwise.

The libel is dismissed for lack of jurisdiction. Counsel may submit findings of fact and conclusions of law in accord with this opinion.

Dated August 5, 1946.

[File endorsement omitted.]

[fol. 22] IN UNITED STATES DISTRICT COURT

ORDER DISMISSING LIBEL—Filed August 15, 1946

It is ordered:

That the libel herein is dismissed for lack of jurisdiction, and that respondents have judgment for costs.

Counsel for respondents will submit findings of fact and conclusions of law in accordance with the rules of court and the opinion filed herewith.

(s) A. F. St. Sure, U. S. District Judge.

[File endorsement omitted.]

[fol. 23] IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION AND ORDER DENYING MOTION "TO REOPEN THE CAUSE"—Filed August 15, 1946

Libelant has moved "to reopen" this cause "for the purpose of amending the libel to conform to the proof, and for further proceedings". Counsel has cited an authority in support of that procedure and, in addition, asserts that by its general appearance the United States "waived any objection to the jurisdiction of the court and the court therefore had jurisdiction". Filed with the notice of motion is a stipulation signed by government counsel, to the effect that the motion may be granted.

The libel was dismissed for lack of jurisdiction. The government did not challenge the jurisdiction of the court, and there was neither allegation nor proof of ultimate facts essential to support a judgment on any one of the four causes of action.

Failure of respondents' counsel to challenge jurisdiction by motion to dismiss, or exceptions to the libel or by answer, thrust upon the Court not only the burden but the duty, sua sponte, to determine its jurisdiction to consider the merits. (Minnesota v. Hitchcock, 185 U. S. 373, 382; Matthews v. Rodgers, 284 U.S. 521, 524; Twist v. Prairie Oil Co., 274 U.S. 684, 690; Bell v. Hood, 9 Cir., 150 F. 2d 96, 99; Emmons v. Smitt, 6 Cir., 149 F. 2d 869, 871; Millslagle v. Olson, 8 Cir., 130 F. 2d 212, 213; De Filipps v. Chrysler Sales Corp., 2 Cir., 127 F. 2d 530, 531; Orth v. Transit In-
[fols. 24-27] vestment Corp., 3 Cir., 132 F. 2d 939, 941).

Non-existent jurisdiction is never waived; nor can it be conferred by consent of the parties. (City of Gainesville v. Brown-Crummer Co., 277 U. S. 54; Cutler v. Rae, 7 How. 729, 731; Pittsburgh Etc. Ry. Co. v. Ramsey, 22 Wall 322, 327; Mitchell v. Mauer, 293 U.S. 310, 313).

Admitting that seamen are often treated as wards of the Court and that strict application of ordinary rules of pleading and practice is often relaxed in admiralty cases, the interests of justice in this case do not require nor warrant any further proceedings. To grant this motion would be tantamount to granting libelant a new trial. There is no reason therefor. There are cogent reasons disclosed by the records for denying the motion.

It is therefore ordered that the motion be, and the same hereby is denied.

(S.) A. F. St. Sure, United States District Judge.

Dated: August 15, 1946.

[File endorsement omitted.]

[fol. 28] IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law—Filed October 14, 1946

The above entitled matter came on regularly for trial on April 4, and 5, 1946, Herbert Resner, Esq., of the firm of Gladstein Anderson Resner Sawyer & Edises appearing for libelant; Frank J. Hennessy, United States Attorney, by William E. Licking, Assistant United States Attorney, appearing for the United States of America, War Shipping Administration, and J. Hampton Hoge, Esq., and Henry W. Schaldash, Esq., appearing for American South African Line, Inc., and the Court having rendered its opinion herein, now makes its findings of fact and conclusions of law:

FINDINGS OF FACT

I

The libel herein fails to allege that libelant is a resident within the jurisdiction of this Court, or that he has no residence within the United States. (Second Seamen's War Risk Insurance Act, 46 USCA 1128(d)).

II

The libel fails to all-ge that libelant had a principal place of business within the jurisdiction of this Court or that the Escanaba Victory was found within this district at any time. (Suits in Admiralty Act, 46 USCA 741,742).

III

The libel fails to allege that at the time of libelant's al- [fol. 29] leged injury the Escanaba Victory was lying in navigable waters.

IV

The libel fails to allege that the injury allegedly suffered by libelant was suffered in course of his employment. (Jones Act, USCA 688).

V

Allegations of the libel reveal that the alleged injury was suffered after libelant's employment on the Escanaba Victory was terminated.

VI

No evidence was offered in respect to any ultimate fact essential to a showing of jurisdiction.

VII

The libel fails to allege any fact disclosing libelant's right to sue the United States.

Conclusions of Law

I

The libel fails to state a claim upon which relief could be granted.

II

The Court was without jurisdiction to entertain the cause on the merits.

A. F. St. Sure, United States District Judge.

October 10, 1946.

[File endorsement omitted.]

[fol. 30] In the United States District Court for the Northern District of California, Southern Division

In Admiralty

No. 24322S

Earl P. Hoiness, Libelant,

vs.

United States of America, War Shipping Administration of the United States of America, American South African Line, Inc., a Corporation, The Doe Company, Richard Roe and John Doe, Respondents

Decree—Filed October 14, 1946

This cause came on regularly to be heard before the court on April 4 and 5, 1946, the Honorable A. J. St. Sure presid-

ing, sitting without a jury; the libelant was present in person and represented by his proctors, and the United States of America and American South African Line, Inc. was represented by their proctors; and thereupon oral and documentary evidence was introduced on behalf of each of the parties hereto, and evidence having been concluded, the cause was argued to the Court by respective counsel, and at the close of argument submitted to the Court for decision, and thereupon the Court, being advised in the premises, made and signed and ordered filed herein its findings of fact [fol. 31] and conclusions of law which are by reference made a part hereof.

Wherefore, by reason of the law and the evidence and the premises, and the findings of fact and conclusions of law, as aforesaid, it is ordered, adjudged and decreed that the above-entitled Court has no jurisdiction over the subject matter of the action, and that the libel be dismissed.

Dated: October 14, 1946.

A. F. St. Sure, United States District Judge.

[File endorsement omitted.]

[fol. 32] In United States District Court

Libelant's Petition for Appeal and for Leave to Proceed on Appeal Without Bond, Fee, or Costs—Under 28 U. S. C. A. 837—Filed October 18, 1946

Comes now the libelant herein, Earl P. Hoiness, and being aggrieved by the rulings, findings, judgment and decree made and entered herein on October 14, 1946, by the above-entitled United States District Court, does hereby claim an appeal from said rulings, findings, judgment and decree to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that his said appeal may be allowed.

The points and grounds of appeal are the following:

1. The decree and judgment of the Court dismissing the above-entitled action upon the ground that the Court lacked jurisdiction is contrary to law and is in error.

2. The Court erred in failing to consider and determine the above-entitled cause on its merits.

3. Respondent United States of America waived any jurisdictional defect by appearing, pleading, answering to the merits, and trying the case on the merits.

4. The Court erred in making findings of fact and conclusions of law based upon the Court's erroneous order and finding that the Court was without jurisdiction.

5. The judgment and decree are contrary to law and to the evidence, and the Court should have considered the case on its merits and found a decree in favor of libelant.

Libelant prays leave to prosecute this appeal without furnishing bond or making any prepayment or deposit to [fol. 33] secure fees or costs, under the provisions of 28 U. S. C. A. 837.

Dated: September 15, 1946.

Gladstein, Andersen, Resner, Sawyer & Edises,
(S.) Herbert Resner, Proctors for Libelant and Appellant.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed October 18, 1946

The within appeal is hereby allowed.

It is further ordered that libelant is granted leave to prosecute this appeal without furnishing bond and without prepayment or making deposit to secure fees or costs, under provisions of 28 U. S. C. A. 837.

Done in Open Court this 18th day of September, 1946.

(S.) A. F. St. Sure, Judge of the United States District Court.

[File endorsement omitted.]

[fol. 34] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed October 18, 1946

Comes now the libelant herein, Earl P. Hoiness, and hereby assigns as error in the proceedings, orders, decision, judgment and decree of the above-named District Court in the above-entitled action the following:

1. That the District Court erred in finding a decree in favor of the respondent United States of America and against libelant Earl P. Hoiness.

2. That the District Court erred in allowing the Findings of Fact and Conclusions of Law proposed by respondent United States of America and in refusing to allow the amendments thereto proposed by libelant.

3. That the District Court erred in its Order and Decree dismissing the above-entitled action upon the ground that the Court lacked jurisdiction over the subject matter.

4. That the District Court erred in refusing to consider the above-entitled case on its merits, the respondent having submitted to the jurisdiction of the Court and having waived any jurisdictional requirements or defects.

5. That the District Court should have considered the case on its merits and should have found a decree in favor of libelant.

6. That the decree herein in favor of respondent and against libelant is contrary to the evidence adduced at said trial.

7. That the decree herein in favor of respondent and against libellant is contrary to the law.

[fols. 35-38] Dated: October 15, 1946.

Gladstein, Andersen, Resner, Sawyer & Edises, (S.)
Herbert Resner, Proctors for Libelant and Appellant.

(Receipt of Copy)

[File endorsement omitted.]

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO REOPEN CAUSE FOR THE PURPOSE OF AMENDING PLEADINGS AND FURTHER PROCEEDINGS—Filed August 12, 1946

To Respondent United States of America and
To Messrs. Frank J. Hennessy, William E. Licking, John H. Black, Edward R. Kay, Henry Schaldach, and J. Hampton Hoge, Its Proctors:

You Will Each Please Take Notice that libelant, by his proctor Herbert Resner, will move the above-entitled Court for its order on Monday, August 12, 1946, at the hour of 10 [fol. 40] o'clock a. m., at the courtroom of said Court, Post Office Building, 7th and Mission Streets, San Francisco, California, before the Honorable A. F. St. Sure, Judge thereof, to reopen the said cause for the purpose of amending the libel to conform to the proof, and for further proceedings.

Said motion will be based upon this notice, upon all of the files, records, papers, and proceedings in the within cause, upon the Memorandum of Points and Authorities attached hereto and filed herewith, and upon argument of counsel.

Dated: August 10, 1946.

Gladstein, Andersen, Resner, Sawyer & Edises, Herbert Resner, Proctors for Libelant.

MEMORANDUM OF POINTS AND AUTHORITIES

I

In admiralty on a proper showing and in the furtherance of justice, after a hearing is concluded, the case may be reopened and further proof received.

DeSoyza v. Dollar SS Lines, 292 Fed. 490.

II

The United States in this case, by appearing and pleading to the merits, waived any objection to the jurisdiction of the court, and the court therefore had jurisdiction.

[fol. 41] *Jarnvagsstyrelsen v. U. S.*, C. C. A. N. Y. 1927, 19 F. 2d 761

Commercial Trust Co. v. United States Shipping Board Emergency Fleet Corporation, C. C. A. N. Y. 1931, 48 F. 2d 113.

Receipt of Service of Copy.

[File endorsement omitted.]

[fols. 42-47] In United States District Court

[Title omitted]

Stipulation—Filed August 12, 1946

It is hereby stipulated by and between respective counsel that the motion on behalf of libelant to reopen the above matter for the taking of further testimony and amending said libel be granted by the above court.

Dated August 9, 1946.

Herbert Resner, Proctor for libelant. Frank J. Hennessy, United States Attorney, by W. E. Licking. John H. Black, Edw. R. Kay, Of Counsel for United States of America and proctors for American South African Line, Inc.

[File endorsement omitted.]

[fol. 47-a] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 11,479

EARL P. HOINESS, Appellant,

vs.

UNITED STATES OF AMERICA, et al., Appellees

Appeal from the District Court of the United States for the Northern District of California, Southern Division

Before Mathews, Healy and Bone, Circuit Judges

OPINION—Filed November 18, 1947

MATHEWS, Circuit Judge.

Appellant (Earl P. Hoiness) filed a libel in personam against appellees (The United States, the American South African Line, Incorporated, and others) in the District Court of the United States for the Northern District of California. The named appellees answered the libel. The others did not answer and, so far as the record shows, were not served with process. A trial was had. Thereafter, without considering the evidence, the court concluded that it lacked jurisdiction, and that the libel, therefore, should be dismissed. These conclusions were stated by the court in an opinion filed on August 5, 1946.[1] Thereupon, on August 5, 1946, the court entered an order dismissing the libel.[2] [fol. 48] The order of August 5, 1946, was a final decision, within the meaning of § 128(a) of the Judicial Code, 28

[1] We quote from the opinion: "Examination of the libel reveals that allegations of facts essential to the court's jurisdiction have been omitted * * * It is obvious, therefore, that the libel is fatally defective. * * * It follows that the libel must be dismissed for lack of jurisdiction."

[2] The order of August 5, 1946, was as follows: "It is ordered: That the libel herein is dismissed for lack of jurisdiction, and that respondents [appellees] have judgment for costs. Counsel for respondents will submit findings of fact and conclusions of law in accordance with the rules of the court and the opinion filed herewith."

U. S. C. A. § 225(a), and was appealable,[3] but no appeal was taken therefrom.

The concluding sentence of the order of August 5, 1946,[4] directed appellees' counsel to submit findings of fact and conclusions of law. There was no apparent reason for such a direction. The court's conclusions of law were stated in its opinion.[5] If its conclusions were correct, no findings of fact were necessary, for its conclusions were based on the libel, not on the evidence. No question of fact was considered or decided.

A document entitled "Findings of fact and conclusions of law" was filed on October 14, 1946.[6] An examination of the document reveals that the so-called findings stated therein were not findings of fact. The stated conclusions were that the libel failed to state a claim upon which relief could be granted, and that the court was "without jurisdiction to entertain the cause on the merits."

There was also filed on October 14, 1946, a so-called decree purporting to dismiss the libel which, in fact, was dismissed by the order of August 5, 1946.[7] From the so-called decree of October 14, 1946, this appeal was taken on October 18, 1946.[8]

As heretofore stated, the order of August 5, 1946, was a final decision. There was no other final decision in this

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[3] Liberty Mutual Ins. Co. v. Pillsbury, 9 Cir., 154 F. 2d 559.

[4] See footnote 2.

[5] See footnote 1.

[6] Whether this document was submitted by counsel or prepared by the court without the aid of counsel the record does not show.

[7] The so-called decree of October 14, 1946, was "that the [District] Court has no jurisdiction over the subject matter of the action, and that the libel be dismissed."

[8] The petition for appeal stated that appellant, "being aggrieved by the rulings, findings, judgment and decree made and entered herein on October 14, 1946, * * * does hereby claim an appeal from said rulings, findings, judgment and decree * * * and prays that his said appeal may be allowed." Said appeal was allowed on October 18, 1946.

case. No other final decision was necessary. The so-called decree of October 14, 1946, was not a final decision and was not appealable.[*]

Appeal dismissed.

[fol. 49] DISSENTING OPINION

HEALY, Circuit Judge, Dissenting:

I think we may, without doing violence to the statute, treat the decree of October 14, 1946 as a "final decision." Clearly, the trial court understood it to be such, and the parties on both sides have so treated it for the purposes of the appeal.

Generally speaking, where an order or judgment has been entered effecting the final disposition of a cause, the federal appellate courts have applied the principle that the subsequent entry of a second judgment, making an identical disposition, can not be permitted to operate as an extension of the statutory period for appeal. Accordingly, appeals from such later judgments are commonly dismissed where taken after expiration of the statutory time for appeal from the first judgment.[1] The rule is a salutary one, serving, as it does, to vindicate a substantial requirement of law. Such was the situation obtaining in the only authority cited in the majority opinion, namely, Liberty Mutual Ins. Co. v. Pillsbury, 9 Cir., 154 F. 2d 559. There the order held to be a final decision was entered December 26, 1944, whereas the appeal from the later decree was not taken until April 24, 1945, that is, more than three months after the entry of the order of December 26.[2] The dismissal was therefore in harmony with the current of authority.

Here, however, the principle animating this line of cases is inapplicable. The appeal taken October 18, 1946 was timely whether taken from the order of August 5 or from the formal decree of October 14. Accordingly, instead of seizing upon some purely formal ground on which we may

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[*] Liberty Mutual Ins. Co. v. Pillsbury, supra.

[1] Cf., for example, Sosa v. Royal Bank of Canada, 1 Cir., 134 F. 2d 955.

[2] Consult 28 USCA §230.

dismiss the appeal, we ought, I think, inquire whether, under the circumstances shown by the record, we can and should entertain it. I am satisfied that we can and should.

In the first place, we can hardly quarrel with the form of the judgment appealed from. Considered by itself, it is in the usual form of a final decree. In the second place, the trial court plainly intended it to operate as such, that is to say, the order of August 5th was not intended to function as the ultimate judgment. Something remained to be done. The order, as appears from the quotation of it in [fol. 50] the majority opinion, directed counsel to "submit findings of fact and conclusions of law in accordance with the rules of the court and the opinion filed herewith." One can not doubt that the experienced judge, who had tried the cause on its facts, labored under the belief that findings and conclusions were requisite. He was probably justified in so believing. The pertinent admiralty rule (Rule 46½) requires that "in deciding cases of admiralty and maritime jurisdiction the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rule 49." It is not accurate to say that no question of fact was considered or decided in the course of the findings. Finding VI states that "no evidence was offered in respect to any ultimate fact essential to a showing of jurisdiction." I think the intention of the trial judge should be given effect and the decree of October 14 accepted as the final decision, Rubber Co. v. Goodyear, 73 U. S. 153; Monarch Brewing Co. v. George J. Meyer Mfg. Co., 9 Cir., 130 F. 2d 582.[3]

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[3] Rubber Co. v. Goodyear seems squarely in point. The question there was whether an order of November 28, 1866, or a formal decree entered December 5, 1866, was to be accepted as the final judgment. The acceptance of the first order as final would necessitate a dismissal of the appeal as untimely. The court said "that the entry made on the 5th of December was regarded both by the court and the counsel as the final decree in the cause. We do not question that the first entry had all the essential elements of a final decree, and if it had been followed by no other action of the

I may add that, in light of the direction for the submission of findings and conclusions, counsel for appellant could not fairly be expected to proceed on the assumption that the order of August 5th was a final judgment, and on such assumption have appealed from it. Under the circumstances, since the appeal was timely whether taken from the order or from the judgment of October 14, I see no [fol. 51] good reason why, if such course be thought necessary, it can not be considered and entertained as though it were an appeal from the order. Compare Prescott Ry. Co. v. Atchison R. Co., 2 Cir., 84 Fed. 213.

[File endorsement omitted.]

[fols. 52-54] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 11479

EARL HOINESS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

DECREE—Filed and Entered November 18, 1947

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the appeal in this cause be, and hereby is, dismissed.

[File endorsement omitted.]

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court, might very properly have been treated as such. But we must be governed by the obvious intent of the Circuit Court, apparent on the face of the proceedings." And in the Monarch Brewing Co. case, supra, this court, in denying a motion to dismiss an appeal from a subsequent judgment, expressed itself as satisfied that an earlier order "was not intended as the rendition of a judgment in favor of the defendant."

[fol. 55] IN THE SUPREME COURT OF THE UNITED STATES

STIPULATION IN RE PRINTING OF RECORD AND RECORD TO BE CONSIDERED ON THE HEARING HEREIN—Filed June 14, 1948

[fol. 56] It is hereby stipulated by and between counsel for the respective parties hereto that the following portions of the record herein shall be printed and shall constitute and be used and considered as the record on the hearing herein:

From Volume I of the Transcript of Record, the following items:

1) Seaman's Libel in Personam; page 1;
2) Answer of the Respondent United States of America; page 11;
3) Opinion of the Court; page17;
4) Order of the Court; page 22;
5) Memorandum Opinion and Order Denying Motion to Reopen the Cause; page 23;
6) Findings of Fact and Conclusions of Law; page 28;
7) Decree; page 30;
8) Libelant's Petition for Appeal and for Leave to Proceed on Appeal without Bond, Fee, or Costs—Under 28 USCA 837; page 32;
9) Order Allowing Appeal; page 33;
10) Assignments of Error; page 34;
11) Notice of Motion to Reopen Cause for the Purpose of Amending Pleadings and Further Proceedings; page 39;
[fol. 57] 12) Stipulation; page 42;
13) Opinion of the United States Circuit Court of Appeals for the Ninth Circuit; page 47-A;
14) Decree of the United States Circuit Court of Appeals, Ninth Circuit; page 52;

From Volume II, Reporter's Transcript, the following:

15) Testimony of Earl P. Hoiness, pages 4-7, inclusive;
16) Testimony of Earl P. Hoiness, pages 18-19, inclusive;

It is further stipulated by and between counsel for the respective parties hereto that the within case was tried on its merits by both parties herein and at no time herein did respondent United States of America object to the juris-

diction of the trial court to hear and determine the within cause.

Dated: June 2, 1948.

Herbert Resner, Counsel for Petitioner, Gladstein, Andersen, Resner & Sawyer, of Counsel.

Dated June 9, 1948.

Philip B. Perlman, Solicitor General, Counsel for Respondent.

[fol. 57a] [File endorsement omitted.]

[fol. 58] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 29, 1948

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, limited to questions (1) (b) and (2) (a) presented by the petition for the writ and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: Enter Herbert Resner. File No. 52834 U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 604, Earl P. Hoiness, Petitioner, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed February 17, 1948. Term No. 604 O.T. 1947.